

- (1) Whether respondent is entitled to reimbursement for claimant's failure to keep an appointment with Dr. Terrence Pratt.
- (2) Claimant's average weekly wage.
- (3) The nature and extent of claimant's injury and/or disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Respondent, a temporary employment service, contends it is entitled to reimbursement for medical costs associated with an appointment missed by claimant with Terrence Pratt, M.D. Claimant testified he missed the appointment because, to the best of his recollection, he had been sick that day. There is no contradictory evidence presented by respondent as to why claimant failed to appear for the September 13, 1996, appointment. The Appeals Board finds, based upon the only evidence, that there is insufficient justification to order claimant to reimburse respondent for this missed appointment and the Award of the Administrative Law Judge in this regard is affirmed.

The Administrative Law Judge in the Award found claimant's average weekly wage on the date of the accident to be \$312.68. In reaching this conclusion he first had to decide whether claimant was a full-time or part-time employee. K.S.A. 1994 Supp. 44-511(a)(4) defines a part-time employee as one who, by custom and practice, or under verbal or written employment contract in force at the time of the accident, is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week. In this instance, claimant worked for respondent from December 4, 1994, through January 24, 1995, the date of injury and was assigned to Jencast Foundry in South Coffeyville, Oklahoma. This employment period constitutes 7.28 weeks. During this time span there was one week between Christmas and New Years when the plant was closed and was not available to work. This leaves 6.28 weeks during which time claimant was actually employed with and able to work at Jencast. During the 6.28 weeks when claimant was actually employed with Jencast claimant worked 40 hours or more per week for five weeks. The Appeals Board finds, based upon the credible evidence in the record, that claimant was not engaged in work, did not agree to work, and was not expected to work less than 40 hours per week on a regular basis. As such, the Appeals Board finds claimant does not meet the definition of a part-time employee but instead is found to be a full-time employee. In this regard the Award of the Administrative Law Judge is affirmed.

In computing claimant's preinjury average weekly wage the Administrative Law Judge took the hourly rate of \$6.38 times 40 hours per week resulting in a base pay of \$255.20. The Administrative Law Judge then appropriately calculated the weekly overtime of \$57.48 in arriving at the average weekly wage of \$312.68. The method of computing

the average weekly wage utilized by the Administrative Law Judge is appropriate and the Appeals Board adopts same as its own. In this regard the Award of the Administrative Law Judge is affirmed.

In considering the nature and extent of injury and/or disability, the Appeals Board must first look to the language of K.S.A. 1994 Supp. 44-510e which states in part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.”

Two physicians testified regarding claimant's task loss. Lawrence Richard Blaty, M.D., found claimant to have suffered a 59.1 percent loss of task performing ability. Dr. Pratt found claimant to have suffered a 41 percent loss of task performing ability. The Administrative Law Judge, in considering both opinions, found claimant to have suffered a loss of task performing ability of 50.05 percent. The Appeals Board finds the conclusion of the Administrative Law Judge in this regard is appropriate and adopts same as its own conclusions in awarding claimant a 50.05 percent loss of task performing ability.

The Appeals Board must next consider the difference between claimant's average weekly wage at the time of the injury and the average weekly wage claimant was earning after the injury. After claimant lost his job with respondent he became employed as a daycare worker at a job which required him to work one-week-on and one-week-off. Claimant was paid \$10,800 per year for this job. The Administrative Law Judge found that claimant shared the duties of this job and also shared the salary. A review of the evidence in the record indicates that the \$10,800 per year salary was paid fully to both claimant and to another worker with whom claimant shared the job responsibilities. As such, the Appeals Board finds claimant's post-injury average weekly base wage to be \$207.69. The Administrative Law Judge went on to compute the percentage of food allowance attributable to claimant, finding \$12.69 per week to be appropriate. This amount is correct. This computes to an average weekly wage of \$220.38 resulting in a wage loss of 29.5 percent. When considering both the claimant's task loss of 50.05 percent and wage loss of 29.5 percent the Appeals Board finds claimant has suffered a work disability of 39.78 percent and awards claimant same.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated March 21, 1997, should be, and is hereby, modified and the claimant, Ronald Shane Brakhage, shall be granted an award against respondent, Blazer Services, and its insurance carrier, Insurance Company of North America, for an injury suffered on January 24, 1995.

Claimant is entitled to 36 weeks temporary total disability compensation at the rate of \$208.46 per week in the amount of \$7,504.56 followed by 156.73 weeks permanent partial disability compensation at the rate of \$208.46 per week in the amount of \$32,671.94, for a total Award of \$40,176.50.

As of September 10, 1997, there is due and owing claimant, 36 weeks of temporary total disability compensation at the rate of \$208.46 per week or \$7,504.56, followed by 101.14 weeks of permanent partial disability compensation at the rate of \$208.46 per week in the sum of \$21,083.64 for a total of \$28,588.20, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$11,588.30 is to be paid for 55.59 weeks at the rate of \$208.46 per week, until fully paid or further order of the Director.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical may be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 1994 Supp. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Karen Starkey, CSR	
Transcript of preliminary hearing	\$ 99.60
Deposition of Bill Fiscus	Unknown
 Debra D. Oakleaf, CSR	
Transcript of regular hearing	\$ 42.00
 Alexander Reporting Co.	
Deposition of Lawrence Richard Blaty, M.D.	\$244.45
 Dana L. Young, CSR, RPR	
Deposition of Sally Shipley	Unknown

Jay E. Suddreth & Associates, Inc. Deposition of Terrence Pratt, M.D.	Unknown
Court Reporting Service Deposition of Karen Terrill	\$ 155.75
Melissa A. Curry, CSR Deposition of William D. Smith, M.D.	Unknown

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Richard J. Liby, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director